

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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Date Issued: March 6, 2000

Case No.: 2000-INA-0022

*In the Matter of:*

**YEDID NEFECH CORP., d/b/a MATAMIM,**  
Employer,

*on behalf of*

**ABDALLA HOSSAM,**  
Alien.

Appearance: Earl S. David, Esq.

Certifying Officer: Dolores Dehaan, Region II

Before: Burke, Huddleston, and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

This case arises from an application for labor certification filed by Yedid Nefech Corp. on December 26, 1997, seeking labor certification for Abdalla Hossam, Alien, for the position of Cook Foreign Specialty (AF 18). Employer requires 2 years experience in job offered. The duties of the job were described as follows:

Prepare and cook Middle Eastern & European cuisine including Blintzes, Cheese Lasagna, Kugel & Kishka, Noodles, Bourekas, Kasha Varnishke, Chulent, Shlishkes, Soups & others. Estimates food costs, garnish foods according to menu or customer order.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on January 13, 1999, on the grounds that the job offered does not meet the definition of full-time employment as the Employer has filed five simultaneous applications for labor certification to fill one job opening.<sup>2</sup> Employer was also instructed to advise what the Alien has been doing since 2/91, the date of his last employment indicated on the application. (AF 25).

Employer submitted rebuttal on March 22, 1999, which consisted of a letter from the owner, copies of invoices for office supplies, groceries, cooking utensils, 1996-1998 federal income tax returns, and a copy of a menu (AF 83). The Employer did not address the CO's finding regarding the full-time employment issue as it relates to the other pending labor certification applications. The Employer also did not respond with information about the Alien's status since 2/91, the date of his last employment indicated on the application.

The CO issued a Final Determination denying certification on April 26, 1999 on the grounds that a full-time job opportunity has not been documented in light of the fact that there are four other applications for labor certification pending for the same position. (AF 85).

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

<sup>2</sup> We are considering at the same time 3 other identical applications with different Aliens pending before the Board as follows:

1. In the Matter of Matamim on behalf of Madjidi Laguide, 1000-INA-19;
2. In the Matter of Matamim on behalf of Mostafa Ibrahim, 1000-INA-20;
3. In the Matter of Matamim on behalf of Yehuda Alkobi, 1000-INA-21.

The fifth application referred to by the CO is not currently pending before the Board.

Employer requested administrative-judicial review of the denial on May 27, 1999, stating that the company has submitted financial information which shows that it has sufficient funds to pay the offered salary.

### Discussion

The requirement of a bona fide job opportunity arises out of § 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." Although the words "bona fide job opportunity" do not appear in the regulations, this administrative interpretation was approved by the court in *Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987):

The regulations require a "job opportunity" to be "clearly open." Requiring the job opportunity to be *bona fide* adds no substance to the regulations but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of § 656.20(c)(8). Likewise, requiring that the job opportunity be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of § 656.50. *Id.*, slip op. at 7.

In *Amger Corp.*, 87-INA-545 (Oct. 15, 1987) (*en banc*), the Board followed *Pasadena Typewriter*, stating that the "employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker."

In *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (*en banc*), the Board reaffirmed the principle that § 656.20(c)(8) "infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." *Id.*, slip op. at 8-9 (footnote and citations omitted).

In the instant case the CO required the Employer to submit additional evidence which demonstrates how permanent full-time employment can be guaranteed for the position offered, and particularly in light of the fact that 5 applications have been submitted. The Employer's rebuttal did not mention the fact that multiple applications for labor certification had been filed. Employer also did not address the CO's request for an explanation as to the Alien's status since 2/91.

The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, *STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 88-INA-40 (July 5, 1988), especially where the employer does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991).

Employer failed to provide the documentation required in the NOF, which was directly relevant to the issue of whether there exists a full-time bona-fide job opportunity to which U.S. applicants could be referred. Moreover, Employer failed to explain his failure to comply or to provide any evidence that such documentation was not reasonably obtainable.

### **Order**

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

